No. 13,681

In the

United States Court of Appeals

For the Ninth Circuit

ERNESTINE C. SINISCAL and ELMER A. REED, *Appellants*,

vs.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton; HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife; WILLIAM F. BRENNER and FRED M. MARSH, *Appellees*.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton, *Appellant*,

vs.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife, and S. D. ALEXANDER, *Appellees*.

Appellants' Petition for Rehearing

On Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, *District Judge*

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DAILY JOURNAL OF COMMERCE

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PETITION FOR REHEARING

The appellants herewith present their petition for a rehearing with the request that the Court sit and hear it, in banc.

That the court erred in its opinion in the following respects:

I.

Did the trial court have jurisdiction over these applicants, Reed and Siniscal, when both appellants were enrolled Indians and living on a reservation, and as such, the relation of guardian and ward existed between them and the U. S. A., while the U. S. District Attorney appears for the guardian, ward and as trustee of the two Indian plaintiffs, who are allottees of inherited interests, and who filed a cross appeal.

How then can a valid process be served in this suit upon these incompetent appellants alone, and further, when at the same time their guardian, U. S. A. has an adverse interest? That is the question to be answered.

This court in its opinion recites "We think 25 U. S. C. Sec. 175 is not mandatory, and that its purpose is no more than to insure the Indians adequate representation in suits to which they might be parties" and conclude "were ably represented by counsels, and that is sufficient". We submit that this rule has no application to this situation.

Appellants are incompetent Indians, and any process served personally upon them alone was of no force and effect without a service of summons upon a guardian ad litem. Appellants have maintained this position since the filing of this suit in the lower court.

The court cites *Rule 61 Fed. Rules of Procedure.* However, we submit after a careful reading of it that it does not apply to a suit of this nature and character. We are dealing here with a jurisdictional question, in that, the service of process upon an incompetent alone never confers jurisdiction upon the court. The U. S. A. has declared these appellants incompetents and wards of the government, and we submit that no court can secure jurisdiction over these Indian wards without due process of law. The government recognizes the law of the state in the service of process.

It is well settled in all jurisdictions that all proceedings had subsequent to an unlawful service of process are absolutely void. If the service of process is defective, no acts, conduct, or rule can make it otherwise.

It is for the government and not the Courts to determine when the relation of guardian and ward ceases; it is factual and not judicial.

In *Winton vs. Amos et al.*, 65 L. Ed. 684 (pg. 688, Col. 1, & pg. 695 Col. 1,) where incompetent Indians were defendants, the government appointed the governor guardian ad litem to serve process on, and the Attorney General to represent the guardian ad litem, and the Supreme Court held that to be sufficient.

In *Rule 17 (c), Title 28 F. R. C. P.* recites that the Court shall appoint a guardian ad litem for an incompe-

tent person, not otherwise represented in an action, or shall make such other order, as it deems proper for protection of an incompetent person. No such order was ever made for these incompetents, and they were treated as though they were competents, while their guardian was acting adversely to them.

In *Zaro vs. Straus et al.*, 167 Fed. Rep. 2nd 218, where an Indian woman was incompetent and had a former guardian in Ohio, and service of summons was made upon her personally in Florida, where she then resided, and an attorney thereupon represented her in court, but the court held that the service of process was insufficient to give the court jurisdiction, and in as much as she was incompetent, a guardian ad litem should have been appointed for defendant by the court, and service of the summons be made upon the guardian ad litem, in order to obtain jurisdiction over the incompetent, as provided by the laws of the State of Florida.

In the State of Oregon, where these incompetents are residents, the statute provides for personal service of summons upon both the guardian ad litem and his ward, in order to obtain jurisdiction, Sec. 1-605 O. C. L. A., which has been the law in that state for many years past. The U. S. Rule requires that service of the summons shall be made according to the Statute of the state wherein the incompetent resides, which was not pur-

sued in this suit here, and the District Court never acquired jurisdiction over these incompetents and the subject matter.

In *Sandoval vs. Rosser*, 26 S. W. 950 (see p. 954) holds that a general guardian cannot appear for minors in a suit where he is adversely interested, and a guardian ad litem should have been appointed for the incompetents in order to obtain jurisdiction.

Also *Kidd vs. Prince*, 182 S. W. pgs. 725-729-731 (Tex.) holds that notwithstanding there was no statute or law on the subject forbidding or permitting it, and it is therefore void, unless a guardian ad litem is appointed for the incompetents whose interests are not adverse, even though the process was regularly served upon the incompetents. This also applies to parents as natural guardians.

In our extensive search we have not found a single decision which supports the rule laid down by this court that an incompetent is not entitled to a guardian ad litem in a court proceeding, and especially where their guardian held adverse interests to the incompetents.

II.

ESCROW

After the sale of the Indian land was completed, the Taylors and appellants went to the office of Mr. Hen-

derson, where the escrow was executed.. However, the fact is that the Taylors by their attorneys had theretofore investigated the title to this land and were advised by the title company that it would not issue a title policy until a fee patent had been issued, and the Taylors knowing this fact provided in the escrow agreement, Ex. 2 A, for the escrow holder to pay this money to Ernestine C. Siniscal upon receipt from their attorneys that they have rendered an opinion that a merchantable title is vested in the Taylors of this land.

The escrow to terminate at 6:00 o'clock P. M. August 14, 1951 unless you receive also from the Taylors' attorneys an objection to the title of said real estate, which is to be corrected. The escrow bank never had control over this escrow, as it remained under the complete control of the Taylors' attorneys, and therefore it is void.

We submit that this escrow was executed in fraud and deceit by the Taylors with the sole object, intent and purpose to and did defraud the appellants out of their money justly due them.

Furthermore, the escrow was limited from August 7th to Aug. 14th, 1951. The appellants did not become aware of the fact at that time that the Taylors had previously examined the title, until at the time of the trial.

The payment was to be made to Siniscal for her services, and she was told at the time, pages 778-788 Tr. of Record, all she had to do was to sign the papers at the Indian Bureau. She knew nothing about the procedure. Siniscal had nothing to do with the title except convey the land to the Taylors.

The escrow agreement is also void as to these appellants for the reason that it was willfully conceived by the Taylors with the object and intent to deceive and defraud her out of this money. The Taylors definitely knew and were fully aware at the time that a fee patent was required to this land, before it could be conveyed to them, and that the title company would not issue a title policy until a fee patent was issued. Furthermore, on August 24, 1951 the Taylors had Siniscal sign an application for a fee patent, and this court held that it approved the trial judges finding that no patent was ever issued; see pgs. 195-196, 296-297, Ex. 26 pg. 348, 351, 352, 591, 592, 593, Tr.

It will be observed that Ex. 70 and Ex. 71 are dated May 1952, and the sale was had August 7, 1951; see page 608-609, 668 and 675 Tr. Where are the rest of these telegrams and letters Mr. Henderson refers to? We were unable to obtain any information in that respect.

The U. S. attorney in its brief stated that the tran-

script did not mention anything about a patent having been issued. What about Mr. Henderson's direct statement in the Tr. pg. 609 that a patent had issued and would be forwarded in 3 weeks to the land office, which was not disputed. The court does not specifically point out that the escrow is invalid, unless it could be possibly inferred in the general statement "that the judgment is affirmed in so far as it voids all transactions relating to the transfer of the land."

We again call the Courts attention to our brief Pg. 27 as to the law and facts in the escrow agreement.

We believe that in view of the law and facts in this case, we are entitled to a rehearing in this case.

We seriously question the right of Siniscal as an incompetent to enter into the escrow agreement, without a guardian's consent and an order of court.

The incompetent could recover the money by an action at law for services rendered by the appointment of a guardian ad litem.

The appellants' attorneys waive oral argument on the appellants' petition for rehearing.

Respectfully Submitted,
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